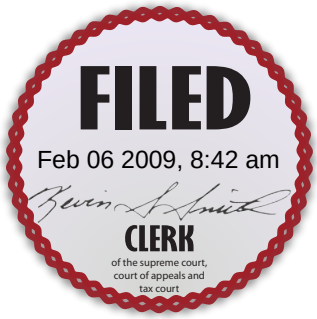

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IN THE
COURT OF APPEALS OF INDIANA

DONALD C. NELSON, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A05-0808-CR-463
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0606-FB-477

February 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Donald C. Nelson, Jr. appeals the sentence he received following his conviction of Robbery,[1] a class B felony, which was entered upon his guilty plea. Nelson challenges the appropriateness of his sentence as the sole issue for review.

We affirm.

The facts are that on January 25, 2005, Nelson was charged under cause number 47D02-0502-FD-128 (FD-128) with battery as a class D felony, but the charge was ultimately reduced to a class A misdemeanor. While he was out on bond for FD-128, Nelson committed an armed robbery in Gulfport, Mississippi. Approximately two weeks later, on June 21, 2006, Nelson committed the instant offense. On that day, he entered the Monroe County Bank in Bedford, Indiana, armed with a .357 Magnum handgun. He walked up to bank teller Misty Gobin and demanded cash. Police were immediately alerted and converged on the bank. They spotted Nelson fleeing from the area and cornered him in a recruiting station. Nelson surrendered without incident, throwing out his backpack, with the .357 Magnum inside it, exiting the building, and admitting his guilt. Nelson was charged with robbery as a class B felony and intimidation as a class C felony in connection with this incident.

On June 7, 2006, Nelson was charged in U.S. District Court for the Southern District of Mississippi under cause number 1:07CR48-1 (the federal charge). On November 8, 2006, Nelson was convicted on the FD-128 charge and sentenced to 355 days in prison. He was found guilty on the federal charge on December 12, 2007, and sentenced to 82 months in

[1] Ind. Code Ann. § 35-42-5-1 (West, PREMISE through 2008 2nd Regular Sess.).

prison.

With respect to the instant case, Nelson eventually pleaded guilty to the robbery charge. At the plea hearing, the State moved to dismiss the intimidation charge.[2] The State also agreed not to pursue charges in another bank robbery in which Nelson was a suspect. Sentencing was left to the court's discretion.

The court entered the following sentencing statement:

> There is a prior criminal history, that is an aggravating circumstance. … There is an OWI in [sic] committed in 97 in Monroe County; then there is a misdemeanor conviction in 98. It's hard for me to tell whether it's a theft that got reduced or a battery, but it's a misdemeanor so the two thefts ah, the "D" felonies weren't reduced to conviction. There is an 03, never mind, that's a deferred prosecution; there's an 05 Battery that was amended so that's a previous Misdemeanor conviction. And I'm also finding that as a mitigating circumstance that incarceration would be hardship on dependants. Clearly it would be. I do find that the aggravating circumstance outweighs the mitigating circumstance and I want to note, clearly the Mississippi ah, matter was a violent crime, it's armed robbery and then shortly after committing that he, he committed this ah, a "B" felony robbery which is a violent crime. When you think of crime sprees we think of a lot of offenses, but within days he committed the same type of violent offense. I believe that's, the record's justified in making to the tow [sic], this sentence consecutive to the Federal case. I am making consecutive to the US District Court, Mississippi's southern district case. I'm unfamiliar with their cause numbers but it appears to be 1:07cr48-1. I'm ordering that the total sentence is 15 years, no time suspended; ah I'm not going to place him on probation here. I'll rely on probation from the Federal case, but it's a 15 year sentence, no time suspended, consecutive to the Mississippi case, technically also consecutive to

[2] Both Nelson and the State indicate that dismissal of the intimidation charge was a part of the plea bargain. We note, however, that the State dismissed this charge before the trial court accepted the plea, and the accompanying colloquy appears to indicate that dismissal of the charge was not a part of the plea bargain. *E.g.*, the court asked, "And the only thing, the only promise made in exchange for [the plea of guilty to robbery] is that the State of Indiana will not pursue nor will they file certain charges. Is that you're [sic] understanding?" *Transcript* at 4. At that point, the State interjected an explanation that if Nelson entered the instant guilty plea, the State agreed not to pursue the investigation of his involvement in another robbery. After this was explained, the trial court asked Nelson, "And is that again the only promise that you have received in exchange for your guilty plea?" *Id*. Nelson responded in the affirmative.

> 05 FD 128 and by doing that he just wouldn't get any credit time for that case because while that was pending he committed this offense, so I have to technically do that since he's not entitled to double credit, so theoretically it's consecutive to 0502 FD 128 and theoretically by law and also consecutive to the southern district. Mr. Nelson this is, the offenses themselves were awful but it is, it is, the impact on your children is devastating. They're going to be close to adults, your one child is, but these are violent crimes ah. Many people have terrible losses. I'm not minimizing either alcohol or drug abuse that ruins families, that ruins individuals, but these are two very violent crimes. You're just very fortunate you weren't hurt or someone wasn't hurt. … Given the violent nature of the two offenses uh, for that reason I'm making the, with the prior history, I'm making the sentence ah, consecutive to the Federal, Federal sentence.

Transcript at 32-34. In summary, the trial court imposed a fifteen-year sentence, to run consecutive to the Mississippi case and "technically" consecutive also to the sentence in the FD-128 case.[3] *Id.* at 33.

Nelson challenges the appropriateness of his sentence, not with respect to the term of years, but rather with respect to the fact that it was imposed consecutive to the sentence imposed for the conviction in federal court. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*,

[3] We presume the trial court was referring here to the mandatory consecutive sentencing provision found at Ind. Code Ann. § 35-50-1-2(d)(2)(B) (West, PREMISE through 2008 2nd Regular Sess.), i.e., "(d) If, after being arrested for one (1) crime, a person commits another crime … while the person is released: … on bond … the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed."

840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Nelson bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

Beginning with the nature of this offense, we agree with Nelson that "there is nothing in the record to distinguish [his] offense from a typical robbery." *Appellant's Brief* at 6. Nelson's use of a gun during the robbery is not so unusual as to render this particular robbery offense especially egregious. We do not mean by this observation to discount the trauma suffered by the teller involved. Whether or not he pointed the gun at her during the robbery (Nelson claims he did not and there is no evidence to the contrary), she did not know Nelson and she did not know his intentions with respect to harming her. Nevertheless, the facts of the robbery do not stand out significantly from those no doubt contemplated by the legislature in setting the advisory sentence for this particular criminal offense.

With respect to Nelson's character, he contends that his remorse and the fact that he pleaded guilty reflect well on his character. It is well established that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *See Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). The extent to which a guilty plea is mitigating will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). It has frequently been observed that "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525. For instance, a guilty plea's significance is diminished if there was substantial admissible evidence of the defendant's guilt. *See Scott v. State*, 840 N.E.2d 376. A guilty plea's significance may also be diminished in direct proportion to the

benefit realized by the defendant in accepting it. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*.

In this case, Nelson was apprehended within minutes of the robbery under circumstances that indicate the evidence of guilt was significant. In exchange for his guilty plea, the State may have agreed to drop a separate felony charge, and certainly agreed not to pursu1e an investigation of his role in an unrelated bank robbery. Therefore, his guilty plea is not a significant mitigating factor.

Although Nelson expressed remorse to the victim during his statement at sentencing, the trial court did not mention it as a mitigator. We presume this means the trial court was not convinced the expression of remorse was credible. From our distant vantage point, we are reluctant to substitute our judgment for the trial court's on this issue. *See Gibson v. State*, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) ("[r]emorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility"); *see also Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) ("[w]ithout evidence of some impermissible consideration by the court, we accept its determination of credibility"). Therefore, we do not find Nelson's expression of remorse is a significant mitigating factor.

Nelson he has a wife and two young children. According to his wife, he enjoys a close relationship with her and his children. By her account, he was a good provider before

he experienced personal difficulties (unexpected deaths in the family) that caused him to begin drinking and using drugs. Clearly, extended incarceration will be a hardship on his family.

On the other hand, as the trial court noted, Nelson has an extensive criminal history, including most notably a flurry of criminal activity in the months leading up to the instant robbery. That history is set out in the trial court's sentencing statement reproduced above and we need not repeat it here. We agree with the trial court that his criminal history is serious and reflects poorly on his character.

After reviewing Nelson's character and the nature of the offense of which he was convicted, we cannot say the imposition of the fifteen-year sentence in the instant case to run consecutive to the sentence for the federal conviction is inappropriate.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur